

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2016 IL App (3d) 130640-U

Order filed January 15, 2016
Modified upon denial of rehearing February 24, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

| | | |
|----------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE OF |) | Appeal from the Circuit Court |
| ILLINOIS, |) | of the 12th Judicial Circuit, |
| |) | Will County, Illinois. |
| Plaintiff-Appellee, |) | |
| |) | Appeal No. 3-13-0640 |
| v. |) | Circuit No. 11-CF-348 |
| |) | |
| RAUNCHINO JAMES, |) | The Honorable |
| |) | Amy Bertani-Tomczak, |
| Defendant-Appellant. |) | Judge, presiding. |

JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not have a duty to admonish defendant of potential conflicts of interest that could be created by his trial counsel's joint representation of him and the codefendants; (2) grand jury testimony of a victim's identification of defendant as one of the intruders, where the identification was subsequently suppressed prior to trial, did not constitute the prosecutor presenting the grand jury with false testimony that would invalidate the indictment; (3) the trial court did not err in finding probable cause to support defendant's arrest; (4) the evidence was sufficient to prove defendant guilty beyond a reasonable doubt; and (5) the record in this case does not support defendant's claim of ineffective assistance of counsel.

¶ 2 Following a bench trial, defendant, Raunchino James, and his two codefendants were convicted of home invasion (720 ILCS 5/12-11 (West 2010)), armed robbery (720 ILCS 5/18-2 (West 2010)), and residential burglary (720 ILCS 5/19-3 (West 2010)). The trial court sentenced defendant to concurrent terms of imprisonment of 21 years, 21 years, and 4 years, respectively. On appeal, defendant argues that: (1) he was denied due process by the trial court's failure to admonish him of the conflict of interest created by his trial attorney's joint representation of him and the codefendants; (2) he was denied due process because the State presented false identification evidence to the grand jury; (3) the trial court erred in finding probable cause to support his arrest; (4) the State failed to prove him guilty beyond a reasonable doubt; and (5) his trial counsel was ineffective for failing to present exculpatory DNA evidence. We affirm the trial court's judgment.

¶ 3 FACTS

¶ 4 A. Grand Jury Proceedings

¶ 5 Defendant and the codefendants were charged by information with committing home invasion, armed robbery, and residential burglary of the home of Dorothy Fullilove on February 19, 2011. The State presented the grand jury with the testimony of Investigator Jarmaine Jones, who was not involved in the investigation of the incident but had reviewed reports. Through those reports, Jones learned that on February 19, 2011, at 1:15 a.m., Dorothy's neighbor placed a 911 call to report that three African American men in black clothing kicked in the door of Dorothy's residence at 617 Gordon Terrace in University Park, Illinois. The neighbor also indicated that shortly thereafter the men ran into the woods behind the residence. Dorothy also made a 911 call and reported that three men had entered through the back door shouting, "This is the police!" The men were all wearing black hoodies and ski masks. All three men had

guns pointed at her and demanded money. Dorothy indicated that the men ransacked her home and took approximately \$200, a \$2,500 "tax return currency", an Xbox game system, a Chicago Bears backpack, a camera, a camcorder, and a laptop and then ran out of the house and into the woods. Dorothy also indicated that her 12-year-old son, Michael Fullilove, was present during the incident.

¶ 6 Jones further testified that three men matching the description that Dorothy and her son had given were seen just outside the woods and were observed running into an apartment building. Police went into the apartment building and knocked on the apartment door of the residence that the men had entered, which was the residence of a relative of defendant. Defendant's relative indicated that defendant had just come into the residence with two of his friends, who the relative had not been expecting. Defendant's relative allowed officers into the apartment, where they recovered two black hoodies, a pair of black sweat pants from the couch where the men were sitting, and a pair of muddy boots. Defendant's relative indicated that the items were not his. Police searched the woods and surrounding area with a canine unit and recovered three loaded handguns, a Bears backpack with an Xbox game system, two bulletproof vests, a camcorder, and a ski mask.

¶ 7 Jones also testified that Michael had described the intruders as all having dreadlocks, with one man appearing to have a "lazy eye." Michael identified all three subjects from a photo array, one of which had a lazy eye.

¶ 8 An indictment was returned by the grand jury against defendant and the codefendants. Loren Middleton entered an appearance as defendant's counsel. Subsequently, Middleton also appeared on behalf of the codefendants.

¶ 9 B. Motions to Quash Arrest and Suppress Identification Evidence

¶ 10 Defendant and the codefendants filed a motion to quash arrest and suppress evidence, arguing that police lacked probable cause to detain and then arrest them. They argued that police arrested them "for nothing more than that they matched the description of 'three male blacks.' "

Defendant and the codefendants also filed a motion to suppress identification testimony, arguing that the six-person photograph lineup shown to Michael was "improperly constituted and therefore conducive to mistaken and suggestive identification." Defendant and the codefendants requested that the trial court suppress the improper pretrial identification of them by Michael, unless the State could show that any in-court identification was not tainted by the improper pretrial identification.

¶ 11 At the hearing on the motions, the State's evidence showed that a neighbor had placed a 911 call and reported three subjects wearing dark clothing broke into Dorothy's home and subsequently ran southbound on Wright Road, which bordered the woods to the east. Within minutes of the neighbor's 911 call, Dorothy also made a 911 call and reported that three "black" males broke into her home, took some items, and then left.

¶ 12 Officer Neil McMahon testified that on February 19, 2011, at 1:30 a.m., he was instructed to assist with a home invasion that had taken place 20 minutes earlier. He was told to stage himself at the 700 block of Sandra Drive to aid in establishing a perimeter of a wooded area and to look for three subjects in their early 20s wearing all black clothing. McMahon parked his squad car at the south end of the wooded area on Sandra Drive. As McMahon was sitting in position, he heard branches and leaves cracking behind him. When McMahon turned around he saw three subjects wearing dark clothing walking toward an apartment building to the southwest of his location. McMahon identified himself as a police officer and requested that the subjects stop. The three men walked quickly toward the apartment complexes. McMahon

followed them with his squad car. McMahon parked the car and again told the men to stop, at which point they went into apartment building number 717. McMahon did not observe the men's facial features or see which unit the men had entered but, through a window, McMahon saw the men walk up the stairs to the second floor.

¶ 13 McMahon waited for other officers to arrive, at which point McMahon, Officer Scott Glowinke, and Officer Pearman entered apartment building 717 to search for the three men. The officers knocked on the apartment doors of the building's four units, asking occupants whether there had been any activity in their units in the past 45 minutes. One resident indicated that his nephew had just unexpectedly arrived at his apartment. McMahon saw the three men from outside in the apartment, whom he recognized from their clothing. McMahon observed some broken leaves on their shoes and that one of them had "some leaves and some forest debris" in his hair. The man who had answered the door gave consent for police to search his apartment. Police handcuffed the other three men and put them into squad cars.

¶ 14 Officer Scott Glowinke testified that he was assisting in the search for the three intruders when another officer located a child's Chicago Bears backpack with an Xbox game system inside on Wright road, on the east side of the woods, a few houses north of Sandra Drive. Although officers did not have information at that point about what had been taken from the home invasion, they knew the incident involved a juvenile and thought the bag's location may have been the offenders' entry point into the woods. Police set up a perimeter around the woods and searched the woods, wherein they found two suits of body armor toward the south end of the woods near Sandra Drive. Sandra Drive bordered the southern end of the woods.

¶ 15 Glowinke received notification that three males wearing dark clothing were observed by McMahon southwest of the woods. At that point, the intruders of the home invasion had been

described by the victims as three black males wearing ski masks and dark clothing. Glowinke proceeded to McMahon's location and assisted in the pursuit of the three men, who went into an apartment building. When defendant and the codefendants were located inside the apartment building, they were wearing dark clothing and one of the men had a pair of dark muddy sweatpants next to him on the couch. Officers also found muddy boots in the apartment, which did not belong to the resident of the apartment. Police detained the three men based on their muddy clothes, the discovery of muddy boots that did not belong to the resident of the apartment, the men's claim that they had been in the apartment for some time when resident of the apartment said that they had just arrived, the men's location within a few blocks from the incident at an early morning hour and within the hour of the incident taking place, as well as the men fitting the description of three African American males wearing dark clothing.

¶ 16 Glowinke testified that within minutes of the men being detained, police conducted a canine search outside of the apartment complex and found a ski mask with a pointed beak-nose in the area where the three men had been walking. Police also searched the woods and found a camcorder, two body armor suits, and three handguns. Police recovered \$60 from each of the codefendants and \$82 from defendant, with \$200 having had been reported stolen by the victim of the home invasion.

¶ 17 Glowinke additionally testified that on the night of the incident, Dorothy's 12-year-old son, Michael, told police that he recognized the voice of one of the offenders as that of a man from the neighborhood named B.G. B.G. was not part of the photo lineup shown to Michael. The next day at the police station, Michael identified defendant and the codefendants as the three intruders from a six-person photo lineup. The photo array consisted of defendant, the two codefendants, and three other subjects. Prior to viewing the photo array, Michael had described the

three intruders as being light-skinned and wearing dark clothing, ski masks, black hoodies, and sweatpants. Michael also indicated that each intruder was each carrying a gun and had dreadlocks. After Michael identified defendant and the codefendants from the lineup, they were placed under formal arrest. Dorothy had also viewed a photo array but was unable to identify any of the men in the photos as being any of the three intruders. She described the intruders as wearing dark clothing and masks and being slightly taller than her.

¶ 18 Officer Joline Rodriguez testified that on February 19, 2011, at 1:15 a.m., she was instructed by dispatch to respond to a home invasion. A neighbor reported seeing three people wearing all black clothing kicking in the back door of Dorothy's home. Shortly thereafter, the neighbor saw the men flee southbound on Wright Road toward the woods. Rodriguez also spoke with Dorothy, who reported that the intruders broke into her home claiming that they were police. Dorothy described the intruders as three "black" males, who were pointing guns in her face and were dressed in all black. Dorothy reported that the men took \$200 from the top of her dresser and \$2500 from inside the dresser, in addition to taking a Chicago Bears backpack, laptop computer, and an Xbox game system. Michael described the men as "three black males" with guns. Michael also indicated that he recognized the voice of one of the men as possibly being that of someone named B.G., who lived in the community.

¶ 19 Police investigator Jones testified that he delivered the body armor vests, guns, camcorder, and facemask to the state police crime laboratory for fingerprint and DNA analysis. Jones testified that even if the three men had not been arrested, all of the evidence would have been processed for DNA analysis. DNA that was found on the facemask matched the DNA profile of one of the codefendants. Jones testified that if the three men had not been in police

custody at the time the DNA results came back, police would have obtained a search warrant to obtain their DNA samples.

¶ 20 Sergeant Gregory Box testified that the day after the incident, Dorothy was interviewed. She was very upset and unable to describe or identify the persons involved from a photo array. The photo array was comprised of six African American males, with five of them having dreadlocks. According to Box, before seeing the photo array, Michael described one of three perpetrators as being cross-eyed and all of them as having braids that had stuck out from under their hoodies. Michael indicated that the men had worn masks and one or two of the men were lighter-skinned. Michael identified defendant and the codefendants from the photo array as being the three intruders. Two of the photographs were brighter than the other photos.

¶ 21 Michael testified that on the night of the incident he awoke and saw two men with guns. The men were searching the house and saying that they needed stuff right now. One of the intruders placed Michael's Xbox game system into Michael's Chicago Bears bag. The three men ran out the front door when they realized that Dorothy had called police. Michael described two of the men as wearing a black masks, black hoodies, boots, and Dickey blue jeans. One of men had twisted dreadlocks. A third man also wore a black hoodie and a black mask, but Michael did not know the type of pants he was wearing. Michael described two of the men as having black eyes and the third man as having hazel eyes. Michael testified that prior to being shown the photo array of six individuals, he was told by police that he did not have to choose anyone if he was unsure about making an identification. He was also told by police that three individuals had been arrested, two of whom were brothers. The photo array had five subjects with black eyes and one subject with hazel eyes. Michael chose subject number one because he had hazel eyes. Michael chose two of the five subjects with black eyes based on their eyes and the fact that their

pictures looked newer and he knew that police had just taken pictures of the men that had been arrested in relation to the incident. Michael also knew that two of the men arrested were brothers and expected them to look similar. Michael testified that as he sat in court, he was not able to tell the judge that the man in photograph number one had been in his house. Michael indicated that he would have been able to identify one of the men based on his eyes and dreadlocks, but "not really" the other two men without the photographs. Michael could identify defendant in court because he had seen the photograph of him.

¶ 22 The State conceded the suppression of Michael's identification of the two codefendants. The trial court additionally granted the motion to suppress Michael's identification of defendant, finding that although the identification was based on the eye color and the hair, the photo-array was too suggestive for the identification to be deemed a positive identification.

¶ 23 In denying the motion to quash the arrest, the trial court found that the police had a duty to investigate the three men given the nature of the crime, the proximity of the three men to the alleged home invasion in the early morning hours, and their refusal to stop when asked by police. The trial court further found that within 30 minutes of the men being detained, police spoke with witnesses and found items reported stolen, guns, and body armor, which gave police probable cause for an arrest.

¶ 24 C. Pretrial Motions

¶ 25 When the parties were ready to proceed to trial, the defendant's attorney was informed of undisclosed police video interviews of Dorothy and Michael and motioned for the trial court to dismiss the indictment. Defendant's counsel claimed that the videos showed that police told Dorothy that the person she was focusing on in the photo array was not a person involved and police allowed Dorothy's fiancé to direct her toward a photo of one of the codefendants.

Defendant's counsel argued that the police misconduct was so egregious that the court should reconsider its denial of the motion to suppress the arrest and dismiss the grand jury's indictment. Defendant's counsel also argued that even though Michael's identification of defendant had been suppressed, it had been presented to the grand jury prior to the suppression and the grand jury would not have returned an indictment without the improper identification evidence.

¶ 26 The trial court found that there was no evidence that the grand jury witness for the State or the prosecutor had intended to purposefully mislead the grand jury. The trial court denied the motion to dismiss the grand jury indictment. The trial court also denied defendant's motion to reconsider the denial of his motion to quash arrest and suppress evidence, finding that the three men were placed into handcuffs and brought to the squad cars for the purpose of further investigation, and within 30 minutes of doing so police had gathered additional evidence to give them probable cause to make an arrest.

¶ 27 D. Bench Trial

¶ 28 At the bench trial, Dorothy testified that on February 19, 2011, at 1:15 a.m., she heard banging at the back door and three men entered her home with guns, announcing that they were police. The men had on dark masks and were small framed. Dorothy could see from around their eyes that two of the men had dark skin and another was lighter-skinned. One of the men had hazel eyes and was cross-eyed. They all had dreadlocks. The men took \$200 made up of 10 twenty-dollar bills, an Xbox game system, a Chicago Bear's book bag, a camera, a computer, and a \$2,500 money order. Dorothy dialed 9-1-1. When the men heard the phone beep, they ran out of the house and into the woods. Dorothy's home is located three houses east of the woods.

¶ 29 Dorothy's 911 call was played at trial, during which she reported that she was located at 617 Gordon Terrace and "three, maybe four" young "black" males with handguns had kicked in

her back door and demanded money. They were dressed in all black with black hoodies.

Dorothy indicated the men took \$200 and an Xbox game system but she did not know what else had been taken. When the dispatcher asked if she knew who the men might be, Dorothy responded, "No." When the dispatcher asked if there was anything else that Dorothy could tell her about three subjects, Dorothy said that her son thought one of the men's voices sounded like a man named B.G. who lived down the street.

¶ 30 Dorothy testified that while Michael thought one of the intruders sounded like B.G., she did not think so. On the night of the incident, police told her that they had gone to B.G.'s home but determined that he had been asleep with his family at the time of the incident. Dorothy testified that all three of the intruders had dreadlocks, whereas B.G. wore his hair in braids. Dorothy testified that when police showed her a photo array, she identified the man that had hazel eyes and was cross-eyed as one of the perpetrators. She also indicated that police had never shown her a black mask for identification.

¶ 31 The defendant's attorney moved to dismiss the charges based on an alleged discovery violation, arguing that the State had failed to disclose that police had interviewed B.G. or that Dorothy had made an identification. The State argued that the police reports indicated that Dorothy had not made any identification and the defense could impeach her testimony. The trial court denied defendant's motion for discovery sanctions.

¶ 32 Officer Neil McMahon testified that on February 19, 2012, at 1:30 a.m., he was instructed by the dispatcher to set up a perimeter at the 700-block of Sandra Drive at the southwest corner of the forest preserve and to look for three subjects wearing dark-colored clothing. At approximately 2:00 a.m., McMahon was observing the wooded area to the north of his position when he heard footsteps behind him with leaves and branches cracking. When he

turned around, McMahon observed three men wearing dark clothing. McMahon identified himself as a police officer and directed the men to stop. The men continued walking and then started running. McMahon followed the men in his patrol car to an apartment complex. McMahon exited his vehicle and identified himself as a police officer. McMahon was 25 feet away from the subjects when they ran into the apartment complex. Through a window, McMahon observed the three men running up a staircase. He did not see their faces.

¶ 33 When other officers arrived on scene, McMahon and the other officers entered the apartment complex. Two apartments were on the lower floor and two apartments were on the second floor. McMahon and Glowinke knocked on all the doors and asked if anyone had entered the residences in past 45 minutes. The man who answered the door to an apartment on the second floor allowed officers to enter his apartment and look around. Three men were sitting on the couch. The three men wore dark-colored clothing and had perspiration on their foreheads. Their hair was "a little disheveled" and one of the men had leaves and branches in his hair. Glowinke placed all three subjects in custody.

¶ 34 Officer Pearman testified that during booking of the three men, he recovered \$82 from defendant and \$60 from each of the codefendants. During Pearman's testimony, he counted the evidence of the inventoried money as totaling \$222: ten twenty-dollar bills, four five-dollar bills, and two one-dollar bills. Pearman did not know where the four five dollar bills had come from.

¶ 35 Officer Glowinke testified that had he searched the surrounding area of the home invasion for three males wearing masks and dressed in black clothing and black hoodies. A fellow officer found a backpack with an Xbox game system near the woods. Officers set up a perimeter to the woods. A canine unit led the officers to two pieces of body armor located inside the woods. Glowinke responded to McMahon's location when McMahon informed him three

black males were walking near the perimeter of the woods. Glowinke entered an apartment building with other officers and knocked on the doors of the apartments. The officers were allowed entry into one of the apartments by a resident. In the apartment, officers found three men, who had on dark clothing, with dirt on some of their clothes and shoes. The men appeared as if they had been running because they seemed out of breath. The three men were taken into custody for investigative purposes. After the men were taken into custody, Glowinke recovered a mask from outside the apartment complex, which he placed in a bag but did not seal. Inside the woods, police found three loaded handguns, a camcorder, and another item.

¶ 36 Glowinke further testified that an officer handled the facemask, without gloves, while questioning Dorothy at the police station. Although the facemask had been found on February 19, 2011, Investigator Jones signed and dated the bag containing the facemask on July 14, 2011, because it had not been previously signed. There was no indication on the bag as to when it was originally sealed. Once the bag was sealed, the only person that would have had access to it was Jones. When Jones received the black mask on July 14, 2011, he submitted it to the crime laboratory.

¶ 37 Defendant objected to the State introducing any DNA evidence from the mask due to an unreliable chain of custody. The trial court took the issue under advisement, noting that the objection went to the weight of the evidence rather than its admissibility.

¶ 38 Kelly Krajnik, a forensic scientist with the Illinois State Police, testified that a mixture of DNA profiles of at least three people was found on the facemask, which included a major DNA profile that matched one of the codefendants. The major DNA profile did not match the DNA profiles of the other codefendant or defendant. There were other minor DNA profile types found on the facemask, but Krajnik "couldn't exclude anybody" so that the minor DNA profile types

"weren't incredibly probative [sic]." The two minor DNA profiles found on the facemask indicated that two people in addition to the one codefendant had physical contact with the facemask. If a police officer did not use a "clean technique" then his gathering of the evidence could generate a minor DNA profile. Whether a major DNA profile was developed was "person-dependent" in that some people shed more cells more easily than others. If a minor DNA profile was present, it could be due to minimal transfers of cells from someone.

¶ 39 After the State rested, defendant's attorney motioned the court to make a directed finding, arguing that there had been no credible evidence that defendant and the codefendants were the persons that committed the crime. The trial court denied the motion.

¶ 40 Defendant introduced the police video interviews of Dorothy and Michael into evidence. The defense also stipulated to the authenticity of an aerial view of the area in question, which included: (1) 617 Gordon Terrace, where the home invasion occurred; (2) 712 Wright Road, where the backpack was found at the perimeter of the woods, a few houses away from the home invasion; (3) 701 Sandra Drive, where McMahon had seen three men walking and where the mask was found; and (4) 717 Sandra Drive, which was the location of the apartment complex where defendant and the codefendants were found.

¶ 41 In the video interview of Dorothy, the interviewing officer confirmed that in Dorothy's written statement she had described the intruders as "three male black" and that they all had on hoodies. In the video interview, Dorothy had described the men as wearing big clothing. She indicated they were slim young men, probably in their twenties. She described one of them as having a medium skin complexion and one having lighter brown eyes. Two of the intruders were approximately her height, five feet eight inches, and one was a little shorter. She thought she would be able to pick the intruders out of a photo lineup because she had intentionally

focused on their eyes. The interviewing officer instructed another officer to take photos of the three men in custody and create a photo lineup. The interviewing officer showed Dorothy a black facemask and asked if it looked familiar, to which Dorothy replied, "Mm-hm." She also indicated that one of the intruders had on ski mask type of hat.

¶ 42 During Dorothy's interview, Dorothy's fiancé indicated that the intruders left a big shoe print on the back door. When the interviewing officer left the room to ask other officers about the shoe print, Dorothy mentioned to her fiancé that the skin around the eyes of one of the intruders looked light. Her fiancé said that if that was the case, then to tell police that the intruders were "light brown."

¶ 43 Dorothy was shown a photo array of five men and was told that the intruders may or may not be in the group. Dorothy scrutinized the photos for some time and then indicated that the eyes of one of the men looked "real familiar." Dorothy also indicated that one of the men in the photos had hazel eyes similar to one of the intruders. She continued to stare at the photographs for some time but did not make a positive identification. The officer ended the interview and said that the man in the photo that Dorothy had said looked familiar was not one of the "perps."

¶ 44 In Michael's video interview, Michael described the manner in which the home invasion took place and the various items that had been taken. He described the first intruder as having long dreadlocks, a face mask (not with the beak), all black clothing, a hoodie, big black boots, and a gun. The other two intruders wore all black clothing and boots, and they had smaller dreadlocks than the first intruder. One of the men wore a beaked mask and was cross-eyed.

¶ 45 After the trial judge reviewed the video interviews, she asked defense counsel if Michael's interview was part of the evidence even though Michael had not testified at trial. Defense counsel indicated that Dorothy's interview was more relevant because it was correct

impeachment of the testimony presented at trial, but he did not mean for the trial court to consider Michael's interview. The trial court replied, "all right" and indicated that it found defendant and the codefendants guilty of home invasion, residential burglary, and armed robbery.

¶ 46 Defense counsel filed a motion for a new trial, arguing *inter alia* that: (1) the State failed to prove defendant and the codefendants guilty beyond a reasonable doubt; (2) the trial court erred in denying their motion to dismiss the indictment where the indictment was obtained with perjured or misleading testimony; (3) the trial court erred in denying their motion to quash arrest and suppress evidence; (4) the trial court erred in failing to grant their motion for sanctions due to discovery violations; (5) the trial court erred by failing to rule on their motion to preclude the admission of DNA results due to the lack of a proper chain of custody; and (6) the trial court erred in denying their motion for a directed finding. The trial court denied the motion for new trial.

¶ 47 The trial court sentenced defendant to concurrent terms of imprisonment of 21 years for home invasion, 21 years for armed robbery, and 4 years for residential burglary, respectively. Defendant appealed.

¶ 48 ANALYSIS

¶ 49 On appeal, defendant argues: (1) he was denied due process by the trial court's failure to admonish him of the conflict of interest inherent in his attorney's joint representation of him and the codefendants; (2) he was denied due process where the State presented false identification evidence to the grand jury; (3) the trial court erred in finding that probable cause existed to support his arrest; (4) the State failed to prove him guilty beyond a reasonable doubt; and (5) his counsel was ineffective for failing to present exculpatory male DNA evidence.

¶ 50

I. Joint Representation

¶ 51

Defendant claims that the trial court had a duty to admonish him of the conflict of interest inherent in his attorney's concurrent representation of him and the codefendants. We review *de novo* the legal question of whether the undisputed facts present a *per se* conflict of interest. *People v. Morales*, 209 Ill. 2d 340, 345 (2004).

¶ 52

A criminal defendant's Sixth Amendment guarantee to the right to effective assistance of counsel, made applicable to the States through the Due Process Clause of the Fourteenth Amendment, includes the right to conflict-free representation. *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). Such representation means assistance by an attorney whose loyalty is not diluted by a conflict of interest or inconsistent obligations. *Id.*

¶ 53

Joint representation of codefendants does not establish a *per se* conflict of interest. *Morales*, 209 Ill. 2d at 347. In order to establish a violation of the Sixth Amendment, a defendant who made no objection at trial concerning his counsel's representation must demonstrate that an "actual conflict of interest" impaired his lawyer's performance. *Id.* at 348; *People v. Martinez*, 104 Ill. App. 3d 990, 992 (1982) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)).

¶ 54

Here, we initially note that neither defendant nor his counsel had indicated to the trial court that counsel's representation of defendant actually or potentially created a conflict of interest. Consequently, the trial court did not have a duty to appoint different counsel or ascertain the risk of a conflict due to the joint representation. See *Morales*, 209 Ill. 2d at 348 (automatic reversal for the trial court's failure to appoint new counsel or ascertain the risk of a conflict applies only when a trial court fails to appropriately respond to defense counsel's objection to a representation).

¶ 55 Furthermore, there was no indication of an actual conflict of interest that was created by trial counsel jointly representing defendant and the codefendants that adversely affected counsel's performance. Defendant claims on appeal that "the record makes abundantly clear" that there was an actual conflict between his interests and those of his codefendants because his counsel "could well have arranged a plea agreement for [him]" in light of the fact that there was no DNA evidence on the ski mask tying him to the crime scene. Defendant argues that such a plea agreement would have required him to testify against the codefendants, but his trial counsel had to refrain from pursuing such a plea agreement to avoid "sacrificing" the codefendants in favor of him. Defendant further argues that his trial counsel should have emphasized the DNA evidence against his codefendant and the fact that defendant possessed different denominations of money other than the twenty-dollar bills that were reported stolen.

¶ 56 While it is possible that a conflict of interest could have arose in the concurrent representation of defendant and the codefendants, no actual conflict actually manifested. The mere availability of a strategy that would help one criminal codefendant at the expense of another does not create hostility between their interests. *People v. Mahaffey*, 165 Ill. 2d 445, 457 (1995) (a conviction will not be overturned based on hypothetical conflicts).

¶ 57 In this case, the evidence showed that defendant and the codefendants, three African American males, were found walking together near the woods, wearing dark clothing, in the early morning hours, within 30 minutes of an offense that was reportedly committed by three young "black" males wearing dark clothing and masks, who had fled into the woods. Defendant and the codefendants acted suspicious in disobeying McMahon's request for them to stop and hurrying into a nearby apartment complex. When they were found in the apartment, they were found together and were perspiring and were out of breath. They had dirt or mud on their clothes

and one of them had leaves and branches in his hair. Based on these facts, it does not appear that the interests of defendant and the codefendants had diverged or were hostile to one another so as to create an actual conflict of interest.

¶ 58

II. Identification Evidence to Presented to Grand Jury

¶ 59

Defendant argues that the State violated his due process rights by introducing false identification evidence to the grand jury to procure the indictment. Defendant claims that evidence that Michael had identified him as one of the perpetrators from the photo array misled the grand jury because Michael only chose the photo of him because he was the only person with hazel eyes and the photo was brighter than other photos. The State argues that at the time of the grand jury hearing police did not know that Michael's identification of defendant was based on the brightness of the photo or defendant being the only person in the photo array with hazel eyes. The State also contends that there was adequate other evidence presented to the grand jury to support the return of an indictment.

¶ 60

When facts surrounding what took place at the grand jury proceedings are undisputed, the question of whether a defendant's due process rights were denied is reviewed *de novo*. *People v. Sampson*, 406 Ill. App. 3d 1054, 1057 (2011). A grand jury determines whether the evidence before them constitutes probable cause that a person has committed an offense. 725 ILCS 5/112-4 (West 2010); *People DiVincenzo*, 183 Ill. 2d 239, 254 (1998).

¶ 61

In general, a defendant may not challenge the validity of an indictment returned by a legally constituted grand jury. *DiVincenzo*, 183 Ill. 2d at 255. However, a defendant may challenge an indictment that was procured by prosecutorial misconduct that rises to the level of a deprivation of due process or a miscarriage of justice. *Id.* at 257. A defendant's due process rights can be violated where a prosecutor deliberately or intentionally misleads the grand jury,

uses testimony known to be false or perjured, or presents other deceptive or inaccurate evidence. *Id.*; *People v. J.H.*, 136 Ill. 2d 1, 12 (1990). Therefore, for an indictment to be dismissed, defendant must show that the prosecutor prevented the grand jury from returning a meaningful indictment by misleading or coercing it. *DiVincenzo*, 183 Ill. 2d at 258.

¶ 62 In this case, there is no indication that the grand jury returned the indictment due to being misled or coerced by the prosecutor or that the State knew the reasons that Michael chose defendant from the photo array. Defendant argues that whether the State knew that it was presenting inaccurate evidence to the grand jury is irrelevant because our Supreme Court's rule on the matter is set out in the disjunctive: "The due process rights of a defendant may be violated if the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, *or* presents other deceptive or inaccurate information." (Emphasis added.) *DiVencenzo*, 183 Ill. 2d at 257. However, the testimony that Michael chose defendant from the photo array was not false or inaccurate because Michael chose defendant from the photo array.

¶ 63 Additionally, even without the identification evidence, the grand jury could have determined that probable cause existed that defendant committed the offense to return a meaningful indictment. The evidence presented to the grand jury showed that the intruders were three "black" males dressed in black clothing with dreadlocks, who had run into the woods after the crime. Police discovered defendant and the two codefendants, who matched the description of the three intruders, walking just outside the woods. Defendant and the two codefendants went into an apartment building and were found by police in the apartment of defendant's relative. Defendant's relative was not expecting them, and their unexpected arrival took place at 2:00 a.m. From the apartment, police recovered two black hoodies, a pair of black sweat pants, and a pair of muddy boots, all of which did not belong to the resident of the apartment. Also, proceeds from

the crime were found in the woods, and defendant and the codefendants were initially seen walking near the woods. Thus, after reviewing the grand jury transcript, it does not appear that the prosecutor prevented the grand jury from returning a meaningful indictment by misleading or coercing it.

¶ 64

III. Probable Cause for the Arrest

¶ 65

Defendant argues that the trial court erred in finding probable cause for his arrest because the totality of the circumstances would not lead a reasonable person to believe he committed a crime. The State contends that the trial court properly denied the defendant's motion to quash arrest because there was probable cause that defendant committed the crime at the time of his arrest. In reviewing a ruling on a motion to quash arrest and suppress evidence, we give great deference to the trial court's factual findings, reversing those findings only if they are against the manifest weight of the evidence; we review the ultimate ruling on whether probable cause existed *de novo*. *People v. Grant*, 2013 IL 112734, ¶ 12.

¶ 66

An arrest that is made without a warrant is valid only if supported by probable cause. *Id.* ¶ 11. Probable cause for an arrest exists when the facts known to the officer at the time of the arrest are sufficient for a reasonably cautious person to believe the arrestee committed a crime. *Id.* Whether probable cause existed depends upon the totality of the circumstances at the time of the arrest. *Id.* The determination is governed by commonsense and the probability of criminal activity, rather than proof beyond a reasonable doubt. *Id.* Probable cause does not require a showing that the officer's belief that the suspect committed a crime is more likely true than false. *People v. Hopkins*, 235 Ill. 2d 453, 472 (2009).

¶ 67

Based on the evidence presented in this case, the totality of the circumstances indicate that the facts known to the officers at the time that defendant was taken out of the apartment in

handcuffs were sufficient for a reasonably cautious person to believe that defendant had committed the crime. In reviewing the evidence, we are free to view the evidence at trial as well as the evidence presented at the hearing on the motion to suppress. See *Id.* at 473.

¶ 68 At the time defendant was handcuffed, the facts showed that defendant and the codefendants, who fit the description of the intruders, were observed walking together near the same woods into which the intruders had escaped, within 40 minutes of the home invasion, and within one-third of a mile from the crime. When McMahon asked the three men to stop, the men hurried into a nearby apartment building and up the stairs to the second floor. In searching the apartment building, police found three men, who had just arrived in a second floor apartment at approximately 2:00 a.m. and who matched the description of the three home intruders. Additionally, the three men were perspiring and one of them had leaves and branches in his hair. The owner of the apartment indicated that he was not expecting defendant and the codefendants. Dirt and debris were on the men's clothing. Also, muddy boots that did not belong to the resident of the apartment were found in the apartment.

¶ 69 Given the totality of the circumstances, in light of the fact that police were acting in response to a recent serious crime, we find that probable cause existed for police to arrest defendant. See *Id.* at 476 (police need less of a factual basis to establish probable cause when they respond to a recent serious crime than when it is not known whether a crime has been committed). Accordingly, the trial court did not err in denying defendant's motion to quash arrest.

¶ 70 IV. Sufficiency of the Evidence

¶ 71 Defendant argues that the State failed to prove him guilty beyond a reasonable doubt. In determining whether a defendant's conviction was proven beyond a reasonable doubt, the

reviewing court views the evidence in the light most favorable to the prosecution and asks whether any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 72

Here, there was sufficient circumstantial evidence to support defendant's convictions. At 1:15 a.m., three young "black" males, with dreadlocks, kicked in Dorothy's back door, leaving a boot print on the back door. They were wearing dark clothing and masks and had dreadlocks. The men announced that they were police. Each of the three men had a gun. The men took \$200 in the form of ten twenty-dollar bills, an Xbox game system, a Chicago Bears book bag, a camera, a laptop computer, and a camcorder. The three men ran out of the house and into the east side of the woods. Within approximately 40 minutes of the crime, three African American males wearing dark clothing were observed by McMahon on the southwest side of the same woods that the intruders had fled into. When McMahon asked the men to stop, they hurried into a nearby apartment building and went up to the second floor. In one of the two apartments on the second floor, police found defendant and the two codefendants, who fit the description of three black young males wearing dark clothing. The men had dirt on their clothes and boots. One of them had leaves and branches in his hair. The three men had perspiration on their foreheads and were out of breath. The resident of the apartment confirmed that three men had just unexpectedly arrived at the apartment. Ten twenty-dollar bills were recovered from the men, the same number of twenty-dollar bills taken from the home invasion. A Chicago Bears book bag with an Xbox game system was found on the east side perimeter of the woods. Inside the woods, police found two pieces of body armor, three handguns, and a camcorder. A facemask was found near the area where the three men were observed walking, and the intruders had been

described as wearing masks. In her video interview, Dorothy confirmed that she recognized the facemask that had been found by police.

¶ 73 Defendant was with the two codefendants, making up a trio of men that fit the description of the three intruders, near the same woods into which the trio of intruders had fled, in the early morning hour, within 40 minutes of the crime, and less than one-third of a mile from the crime scene. Considering the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found defendant guilty beyond a reasonable doubt.

¶ 74 V. DNA on the Bulletproof Vest

¶ 75 On appeal, defendant also argues that he was denied effective assistance of counsel because his trial counsel "failed to introduce evidence that the two bulletproof vests likely used to commit the crime contained no DNA belonging to [him] but did contain a major male DNA profile not belonging to any of the defendants." Defendant claims that reports submitted by the State's forensic scientists indicated that a major DNA profile was found on the bulletproof vests and the camcorder, indicating that someone else committed the crimes. Defendant claims there was no sound trial strategy for his counsel's failure to present the exculpatory DNA evidence. The State argues that defendant's counsel did not provide ineffective assistance because even if the DNA evidence had been presented at trial, the outcome of the trial would not have changed.

¶ 76 The record in this case shows that the three handguns, two bulletproof vests, facemask, and camcorder were swabbed for the detection of DNA evidence, which was analyzed by forensic scientists at the Illinois State Police crime laboratory. Prior to trial, the State disclosed, *inter alia*, four forensic scientists as potential witnesses—Christopher Webb, Kelly Krajnik, David Turngren, and Wilburn Wilkins. The State also furnished the defense with various reports

from Webb, Krajnik, Turngren, and Wilkins and a two-page letter from the Illinois State Police regarding "Lab Cse #J11-3055 dated November 30, 2012."

¶ 77 Defendant claims that Krajnik's report indicated, "A major male DNA profile was previously identified [on the vests and the camcorder] which does not match the DNA profiles of [defendant or the codefendants]." While defendant cites to the record for this assertion, Krajnik's report is not in the record on appeal and was not introduced into evidence at trial. In a petition for rehearing on appeal, appellate counsel acknowledged that he incorrectly cited the record and the report is not contained in the record on appeal in this case. Defendant's appellate counsel asks that this court take judicial notice of the report, which is contained in the record of the codefendants' cases on appeal.

¶ 78 At trial, neither the State nor defense counsel questioned Krajnik regarding a major male DNA profile on the vests and camcorder. Defendant claims that his counsel was ineffective for failing to do so because that DNA evidence was exculpatory in that it suggests someone else committed the offenses.

¶ 79 Every defendant has a constitutional right to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. To establish ineffective assistance of counsel, defendant must show both: (1) his counsel's representation fell below an objective standard of reasonableness; and (2) that the substandard representation prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984) (adopting *Strickland*). Whether a defendant received ineffective assistance of counsel is reviewed *de novo*. *People v. Bailey*, 375 Ill. App. 3d 1055, 1059 (2007).

¶ 80 Based on the record in this case, we cannot say that defendant was prejudiced by trial counsel's failure to elicit testimony regarding the existence of the DNA of an unidentified male

on the camcorder and bulletproof vest. Determining the effect, if any, that presenting the evidence of an unidentified male's DNA on the vests and camcorder would have had on the outcome of the trial would be nothing more than mere conjecture and speculation at this juncture. The presence of such DNA does not necessarily corroborate defendant's claim that he was not one of the perpetrators of the crime.

¶ 81 Furthermore, our review of the report indicates that, in addition to the major DNA profile found on the both the vest and the camcorder, minor DNA profiles were found that were potentially incomplete and defendant could not have been excluded as contributing to those minor DNA profiles on the camcorder. Thus, the presence of another person's DNA on the vests and camcorder does not exclude the defendant as one of the perpetrators. Consequently, we cannot say that defendant's attorney was ineffective for failing to present evidence of the DNA of an unidentified male found on the bulletproof vests and camcorder.

¶ 82 CONCLUSION

¶ 83 The judgment of the circuit court of Will County is affirmed.

¶ 84 Affirmed.